In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1358

PACIFIC OIL COMPANY, PETITIONER

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 46-55) is reported at 406 F.2d 452. The opinion of the district court (Pet. App. 20-45) is reported at 273 F. Supp. 203.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1969 (Pet. App. 55). The petition

for certiorari was filed May 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior abused his discretion in refusing to exercise his supervisory authority over the public lands by reinstating oil shale mining claims which had been located prior to 1920 and cancelled in 1933 in the face of a default to charges of fraud and lack of discovery.

STATEMENT

Petitioner filed this suit to set aside the refusal of the Secretary of the Interior to issue patents on its alleged mining claims. The district court and the court of appeals denied the relief sought. The basic and uncontested facts may be summarized as follows:

In 1926 and 1927 petitioner's predecessor in interest filed patent applications for certain oil shale placer mining claims which had been located between 1918 and 1920. In 1929 the local Denver Land Office contested these claims primarily on the ground that "dummy locators" had been used, in violation of law.[1] In 1932 the contest was set for a hearing and the applicant filed a statement that (Pet. App. 48-49):

> The expense of continuing this contest will be very great because of the number of claims involved [38] and the number and variety of the

[1] Additional grounds were that assessment work had not been done and that discovery had not been made as to some of the claims.

charges made in the contest notice. This contestee does not have sufficient funds on hand with which to meet the expenses of such a contest; nor can this contestee secure such funds. Contestee has no property which could be used in securing funds except the oil shale claims being contested, and at the present time there is no market for oil shale lands and nothing can be borrowed thereon.

* * * *

For the reasons herein stated this contestee has not the ability to proceed further with this contest.

Wherefore, this contestee asks, as to the 38 claims still owned by it, that the Commissioner of the General Land Office shall decide this contest on the record as it stands; and, if such decision is adverse to this contestee, that this contestee be allowed repayment of the purchase price of said 38 claims.

At the request of the local District Law Officer and in accordance with the existing regulations authorizing a default ruling in the case of failure to appear or to submit a statement of contrary facts (Pet. App. 50), the Commissioner of the General Land Office in 1933 advised the applicants that their financial inability to defend was (Pet. App. 50):

> * * * no warrant for dismissing the adverse proceedings instituted against the entries and the failure to appear on the date set for the hearing and submit testimony controverting the charges preferred against the entries, is taken as an admission of the truth of the charges and mineral entries * * * are hereby canceled and the Victory

> Nos. 1 to 29, inclusive, and Bitumen Nos. 1 to 17, inclusive, oil shale placer claims are declared to be null and void.

The claimants did not appeal from this decision.

In 1952 and 1953 successors in interest to the original claimants applied for patents on the same claims. But before further action could be taken the applications were rejected in 1959 because "the Department had learned that these claims had been declared void in 1933" (Pet. App. 51). The Secretary in 1963, after appropriate administrative review process, upheld the rejection of the claims (Pet. App. 51-52).

This suit was filed to review that decision, and the district court (Pet. App. 20-45) and the court of appeals upheld it. They agreed it was within the Land Office Commissioner's discretion to refuse to consider financial disability as "good cause" justifying departure from the applicable regulations as to the consequences of failure to appear (Pet. App. 40-41, 52-53). The court of appeals also noted that, while the Secretary could have changed his mind in the exercise of his supervisory power to reopen the old claims, his *ex parte* refusal to do so in these circumstances was justified (Pet. App. 54-55).

ARGUMENT

The question petitioner presents turns solely on the facts of this case and does not raise any legal question of general applicability. In any event, the courts below properly found no abuse of discretion on this record. The long acquiescence by petitioner's predeces-

sors in the 1933 cancellation of the claims fully justified the Secretary's refusal to revive them under his supervisory authority. The principles expressed by the Court of Appeals for the District of Columbia Circuit in *Gabbs Exploration Company* v. *Udall*, 315 F.2d 37, 40-41, certiorari denied, 375 U.S. 822, apply with equal force here:

> We need not consider whether the power to reopen prior decision is merely discretionary with the Secretary or whether, indeed, the errors urged by plaintiff demonstrate that "manifest injustice has been done or the law clearly misapplied," as is required for reopening. Even if we assume that Gabbs has met these threshold objections, plaintiff's argument cannot prevail. The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in Aspen Consolidated Mining Co. v. Williams, 27 L.D. 1, at 11:
>
> > "The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected."
>
> Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between

> the alleged wrong (1929) and plaintiff's attempt to have it corrected (1956). * * *

So here petitioner and its predecessors in interest waited twenty years before seeking re-examination of what it regards (Pet. 6-7) as unfair treatment in the 1933 default proceeding. This request comes too late.

Petitioner's attempt to undermine the Commissioner's 1933 decision (Pet 7-9) cannot advance its cause. This is not a proceeding to review that Commissioner's determination that, under the circumstances, lack of funds was not "good cause" for failure to appear to contest the charges. No appeal was taken from that determination. Consequently, the fact that some other Commissioner in another case under different circumstances decided the "good cause" question differently hardly compels the conclusion that manifest injustice was done that should be righted now, 36 years later, by re-opening those proceedings and annulling the cancellation of the claims of petitioner's predecessors.[2]

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[2] The petition challenges the Secretary's action only for its alleged capriciousness. It does not claim that the action was void, as "beyond his authority," on account of the intervening decision by this Court in *Ickes* v. *Development Corp. (Virginia-Colorado)*, 295 U.S. 639. Accordingly, it does not raise the issue that will be presented by the government's forthcoming petition for a writ of certiorari to the same circuit in *Hickel* v. *The Oil Shale Corp., et. al.*, and we believe there is no reason to defer action on the present case pending the filing of that petition and this Court's action upon it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

ROGER P. MARQUIS,
EDMUND B. CLARK,
Attorneys.

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